

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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UNITED STATES OF AMERICA

v.

NATHAN CRAIGUE

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1:19-cr-142-01-LM

June 8, 2021

2:55 p.m.

TRANSCRIPT OF JURY TRIAL DAY 2
AFTERNOON SESSION
BEFORE THE HONORABLE LANDYA B. McCAFFERTY

Appearances:

For the Government:

John S. Davis, AUSA
Aaron G. Gingrande, AUSA
United States Attorney's Office

For the Defendant:

Dorothy E. Graham, Esq.
Behzad Mirhashem, Esq.
Federal Defender's Office

Court Reporter:

Liza W. Dubois, RMR, CRR
Official Court Reporter
United States District Court
55 Pleasant Street
Concord, New Hampshire 03301
(603) 225-1442

I N D E X

| | <u>PAGE</u> |
|---------------------------------|--------------------|
| PRELIMINARY INSTRUCTIONS | 4 |
| OPENING STATEMENTS | |
| By Mr. Davis | 15 |
| By Ms. Graham | 25 |

| <u>WITNESS:</u> | <u>Direct</u> | <u>Cross</u> | <u>Redirect</u> | <u>Recross</u> |
|------------------------|----------------------|---------------------|------------------------|-----------------------|
| ROBERT WILKINS | | | | |
| By Mr. Gingrande | 30 | -- | | |

| <u>EXHIBITS:</u> | <u>FOR ID</u> | <u>IN EVD</u> |
|-------------------------|----------------------|----------------------|
| (None admitted.) | | |

1 P R O C E E D I N G S

2 MR. MIRHASHEM: We do move for the witnesses to be
3 excluded so they can't hear each other's testimony.

4 THE COURT: Yeah. Sequestration? Go ahead. I'm
5 glad you brought that up.

6 Go ahead, Attorney Mirhashem.

7 MR. MIRHASHEM: Your Honor, Rule 615 provides that
8 at the request of the party, the Court must order witnesses be
9 excluded so they can't hear each other's testimony. We are
10 making such a request. And that's our motion.

11 THE COURT: Okay. No problem with that.

12 MR. DAVIS: No objection, only to note that our
13 designated representative is Case Agent Sean Roberts, who's now
14 seated in the courtroom. He is on our witness list and is also
15 our case agent. So we do ask that --

16 THE COURT: Okay. You don't have any objection to
17 him being in the courtroom through the trial?

18 MR. MIRHASHEM: We don't.

19 THE COURT: Okay.

20 MR. DAVIS: Thank you.

21 THE COURT: Okay. And there is going to be another
22 witness that will be listening in to opening statements. Do
23 you have any objection that that?

24 MR. MIRHASHEM: He's not in the courtroom.

25 MR. DAVIS: He's not here, Judge.

1 THE COURT: Okay.

2 MR. DAVIS: I mean he's not in the courtroom.

3 THE COURT: Okay. All right.

4 I'm just standing because I prefer to stand. I'm
5 waiting for the jury.

6 THE CLERK: So we're all set? I wanted to make sure
7 there are no other issues.

8 THE COURT: Yes.

9 THE CLERK: Okay.

10 WITH THE JURY PRESENT

11 THE CLERK: The Court has before it for
12 consideration today jury trial in the United States vs. Nathan
13 Craigue. It is 19-cr-142-01-LM.

14 THE COURT: Members of the jury, before we begin the
15 trial, I would like to tell you about what will be happening.
16 I want to describe how the trial will be conducted and explain
17 what we will be doing.

18 At the end of the trial, I will give you more
19 detailed guidance in writing on how you're to go about reaching
20 your decision, but now I simply want to explain how the trial
21 will proceed.

22 This criminal case has been brought by the United
23 States Government. I will sometimes refer to the government as
24 the prosecution. The United States Government is represented
25 at this trial by Assistant U.S. Attorneys John Davis and Aaron

1 Gingrande. The defendant, Nathan Craigue, is represented by
2 his lawyers, Dorothy Graham and Behzad Mirhashem.

3 The charge against Mr. Craigue is contained in the
4 indictment. The indictment is simply the description of the
5 charge made by the government against Mr. Craigue. It is not
6 evidence of anything.

7 Mr. Craigue pled not guilty to the charge against
8 him and denies committing the crime. Mr. Craigue is presumed
9 innocent and may not be found guilty by you unless all 12 of
10 you unanimously find that the government has proven
11 Mr. Craigue's guilt beyond a reasonable doubt.

12 Nathan Craigue is charged in an indictment with one
13 count of having violated a federal law by knowingly and
14 willfully making a materially false, fictitious, and fraudulent
15 statement and representation to a federal agent.

16 The first step in the trial will be the opening
17 statements. The government in its opening statement will tell
18 you about the evidence which it intends to put before you so
19 that you will have an idea of what the government's case is
20 going to be.

21 Just as the indictment is not evidence, neither is
22 the opening statement. Its purpose is only to help you
23 understand what the evidence will be and what the government
24 will try to prove.

25 After the government's opening statement,

1 Mr. Craigue's attorney will make an opening statement. At that
2 point in the trial, no evidence will have been offered by
3 either side.

4 Next the government will offer evidence that it says
5 will support the charge against Mr. Craigue. The government's
6 evidence in this case will consist of the testimony of
7 witnesses as well as documents and exhibits.

8 Some of you have probably heard the terms
9 circumstantial evidence and direct evidence. Do not be
10 concerned with these terms. You are to consider all the
11 evidence given in this trial, both circumstantial and direct.

12 After the government's evidence, Mr. Craigue's
13 lawyers may present evidence on Mr. Craigue's behalf but are
14 not required to do so. I remind you that Mr. Craigue is
15 presumed innocent and the government must prove his guilt
16 beyond a reasonable doubt. Mr. Craigue does not have to prove
17 his innocence.

18 After you have heard all the evidence on both sides,
19 the government and the defendant will be given time for their
20 final arguments. I just told you that the opening statements
21 by the lawyers are not evidence. The same applies to the
22 closing arguments. They are not evidence either. In their
23 closing arguments, the lawyers will be attempting to summarize
24 their cases and help you understand the evidence.

25 The final part of the trial occurs when I instruct

1 you about the rules of law which you are to use in reaching
2 your verdict. I will give each of you a copy of my written --
3 of my instructions and I will read them to you out loud. After
4 hearing my instructions, you will leave the courtroom together
5 to make your decision. Your deliberations will be secret. You
6 will never have to explain your verdict to anyone.

7 Now that I have described the trial itself, let me
8 explain the jobs that you and I are to perform during the
9 trial.

10 I will decide which rules of law apply to this case.
11 I will decide this in response to questions raised by the
12 attorneys as we go along and also in the final instructions
13 given to you after the evidence and arguments are completed.
14 You will decide whether the government has proved beyond a
15 reasonable doubt that Mr. Craigie committed the charged crime.

16 To help you follow the evidence, I will now give you
17 a brief summary of the elements of the crime charged, each of
18 which the government must prove beyond a reasonable doubt to
19 make its case.

20 For you to find Mr. Craigie guilty of having
21 violated federal law by making a materially false, fictitious,
22 and fraudulent statement or representation to a federal agent,
23 you must find beyond a reasonable doubt each of the following
24 five elements:

25 First, on or about the date specified in the

1 indictment, the defendant made a false, fictitious, or
2 fraudulent statement or representation; second, the statement
3 or representation was material; third, the statement or
4 representation was made knowingly; fourth, the statement or
5 representation was made willfully; fifth, the statement or
6 representation was made in a matter -- in a matter within the
7 jurisdiction of the government of the United States.

8 I will explain all of these elements in greater
9 detail at the end of the trial.

10 It bears noting at this point, however, that this is
11 a false statement case. The statement alleged to be false is a
12 statement that two of Mr. Craigue's workers were contractors
13 and not employees. In order to prove that this statement is
14 false, the government must prove beyond a reasonable doubt that
15 at least one of these workers was, in fact, Craigue's -- Mr.
16 Craigue's employee.

17 In order to prove that a worker was an employee of
18 Mr. Craigue as opposed to merely a contractor, the government
19 must prove that Mr. Craigue had the power to control the manner
20 and means of the person's work. This is a -- the key
21 distinction between employees and contractors. There are many
22 factors to consider when evaluating whether an employer has the
23 power to control the manner and means of a particular person's
24 work. I will instruct you on these factors at the end of the
25 trial.

1 Again, what I've just given you is only a
2 preliminary outline. At the end of the trial, I will give you
3 a final and controlling set of instructions on these matters.

4 During the course of the trial, you should not talk
5 with any witness or with Mr. Craigie or with any of the lawyers
6 in the case. Please don't talk with them about any subject at
7 all. In addition, during the course of the trial, you should
8 not talk about the trial with anyone else, not your family, not
9 your friends, not the people you work with, or not even your
10 fellow jurors. You should not discuss this case among
11 yourselves until I have instructed you on the law and you've
12 gone to the jury room to make your decision at the end of the
13 trial. It is important that you wait until all the evidence is
14 received and you have heard my instructions on the law before
15 you deliberate among yourselves.

16 Further, you should not communicate with anyone else
17 or the outside world about this case during any part of the
18 trial. This prohibition applies to both receiving information
19 and to giving information. Do not email about it, text, tweet,
20 or share information about it on any blog or website, including
21 Facebook, Google+, MySpace, LinkedIn, or YouTube. You may not
22 use any similar technology or social medium, even if I've not
23 specifically mentioned it here. To disseminate any information
24 about the trial during the trial, whether to your family or a
25 coworker or to the world at large, would violate both my

1 instructions and the court's rules and could lead to a mistrial
2 of this case.

3 Let me add that during the course of the trial, you
4 will receive all the evidence you properly may consider to
5 decide in this case. Because of this, you should not attempt
6 to gather any information on your own which you think might be
7 helpful. Do not engage in any outside reading on the case, the
8 matters in the case, or the individuals involved in the case.
9 Not on the Internet, not in the library, not in your own house.
10 Do not attempt to visit any places mentioned in the case and do
11 not in any other way try to learn about the case outside of the
12 courtroom.

13 Now that the trial has begun, you must not read
14 about it in the newspapers or watch or listen to television or
15 radio reports or read Internet news reports, blogs, chat rooms,
16 or anything else about what is happening here.

17 Many people watch television shows and movies about
18 courts or lawyers and the criminal justice system. Sometimes
19 people are affected by that when they serve as jurors.
20 Television shows and movies can create false expectations about
21 real life; for example, how the trial is going to proceed or
22 what the evidence might look like. You must decide this case
23 on the evidence before you and the law as I give it to you. Do
24 not decide this case even in part based on something you saw on
25 television or in a movie. That is improper and unfair.

1 The reason for these rules, as I'm certain you will
2 understand, is that your decision in this case must be made
3 solely on the evidence presented at this trial. I expect you
4 will inform me if you become aware of any violation of my
5 instructions.

6 At times during the trial a lawyer may make an
7 objection to a question asked by another lawyer or to an answer
8 by a witness. This simply means that the lawyer is requesting
9 that I make a decision on a particular rule of law. Do not
10 draw any conclusions from such objections or from my rulings on
11 the objections. These only relate to the legal questions that
12 I must determine and should not influence your thinking.

13 If I sustain an objection to a question, the witness
14 may not answer it. Do not attempt to guess what the answer
15 might have been had I allowed the question to be answered.
16 Similarly, if I tell you not to consider a particular
17 statement, you should put that statement out of your mind and
18 you may not refer to that statement in your later
19 deliberations.

20 Further, a particular item of evidence is sometimes
21 entered for a limited purpose. That is, it can be used by you
22 for a particular purpose and not for any other reason. I will
23 tell you when that occurs and instruct you on the purposes for
24 which the item can and cannot be used.

25 During the course of the trial I may ask a question

1 of a witness. If I do, that does not indicate I have any
2 opinion about the facts in the case. You should not take
3 anything that I may say or do during the trial as indicating
4 what I think about the evidence or what your verdict should be.

5 Now, let me clarify something ahead of time that may
6 occur in this case.

7 During the course of the trial, I may have to
8 interrupt the proceedings to confer with the attorneys about
9 the rules of law which should apply here. Sometimes we will
10 talk here in the courtroom using the silent microphone system,
11 but some of these conferences may take time, so as a
12 convenience to you and to make sure you're as comfortable as
13 possible, if a conference is going to take some time or I think
14 it will, I will excuse you from the courtroom. I will try to
15 avoid such interruptions as much as possible, but please be
16 patient even if the trial seems to be moving slowly because
17 these conferences often end up saving time for all of us.

18 If at any time during the trial you have a problem
19 you'd like to bring to my attention, please inform the
20 courtroom deputy. This goes for all issues. If you feel ill
21 or need to take a restroom break, just let the courtroom deputy
22 know. I want you to be comfortable. So please do not hesitate
23 to tell us about any issues.

24 Finally, in this trial you'll have the permission to
25 take notes during the evidence. The fact that you've been

1 given permission to take notes does not in any way require you
2 to do so. However, if you decide to take notes, you must
3 observe the following limitations with great care.

4 First, do not allow your note-taking to distract you
5 from listening carefully to the testimony that is being
6 presented. It's important that you observe and listen to the
7 witnesses. If you would prefer not to take notes at all but
8 simply to listen, please feel free to do that.

9 Please remember also that not everything you write
10 down is necessarily what was said. Thus, when you begin your
11 deliberations, do not assume simply because something appears
12 in somebody's notes that it necessarily took place in court.
13 Notes are an aid to recollection, nothing more. The fact that
14 it's written down doesn't mean that it's necessarily accurate.
15 With these limitations, you are granted permission to take
16 notes.

17 At the end of each day and during any breaks during
18 the day, please place your notes in the envelope which has been
19 provided to you. That envelope will be taken and secured each
20 night. The envelope will be returned to you at the beginning
21 of each day. At the conclusion of the case, after you have
22 used your notes in deliberations, they will be collected and
23 they will be destroyed. Nobody will see them. No one will
24 violate the secrecy of your deliberations.

25 As you can see, we have a court reporter who is

1 creating a record of everything that happens in this trial.
2 Sometimes jurors think that they will be able to have a
3 transcript of the trial when they go back to the jury room.
4 That is not true. You will not be given a transcript. There
5 are a number of reasons for that, but one of the reasons is
6 strictly practical. Usually there's not enough time to prepare
7 one. The court reporter has a difficult job and it's a
8 time-consuming task to take a raw record which she is creating
9 and turn it into a final transcript. So you will not have a
10 transcript and you should, therefore, listen very carefully and
11 take whatever notes you think may be necessary to help you
12 remember the testimony.

13 If you choose not to take notes, remember that it's
14 your own individual responsibility to listen carefully to the
15 evidence. You cannot give this responsibility to someone who
16 is taking notes. We depend on the judgment of all members of
17 the jury. You all must remember the evidence in this case.

18 Finally, do not discuss this case with your fellow
19 jurors until all the evidence is in, you've heard my
20 instructions on the law, and I instruct you to begin your
21 deliberations. Similarly, do not make up your mind about what
22 the verdict should be until after you and your fellow jurors
23 have discussed the evidence and deliberated. Keep your mind
24 open and do not ever forget that Mr. Craigie is presumed
25 innocent of this charge now, throughout this trial, and

1 throughout your deliberations until such time as all 12 of you
2 find that the government has proven each element of a charged
3 crime beyond a reasonable doubt.

4 Thank you for your attention. Now we will begin
5 opening statements. We will hear first from the government,
6 Attorney John Davis.

7 MR. DAVIS: Good afternoon. This is a false
8 statements case. It's about two men, Kenny McKenna, and the
9 defendant, Mr. Nathan Craigue, and a workplace relationship
10 that lasted more than 20 years.

11 Kenny McKenna was a carpenter and a laborer. He was
12 noticeably thin and most everyone called him Skinny. He was
13 loyal and he devoted most of his life to working for Craigue &
14 Sons Home Exteriors, LLC, also called Craigue & Sons for short.

15 Craigue & Sons is a business here in Concord that
16 installs siding and windows on residential and commercial
17 buildings. And Kenny McKenna was the mainstay. 51 years old
18 in the summer of 2018, Kenny McKenna was still a hard worker,
19 going up and down ladders in the heat.

20 The defendant, Nathan Craigue, was the owner of
21 Craigue & Sons. He took over the family siding and windows
22 business from his father in about 2002 and he operated the
23 business continuously from then until 2018.

24 Mr. Craigue bid for and got the jobs for Craigue &
25 Sons and he bought the materials, he supplied the heavy tools

1 and equipment, and he directed the work. As the owner,
2 Mr. Craigue would come and go from the jobsites, but Kenny
3 McKenna was the go-to laborer, leading small crews of one to
4 three workers and sometimes working alone.

5 This case is also about the events of a single day,
6 August 28th of 2018, at a Concord medical office building where
7 Craigue & Sons was nearing the end of a job. The building was
8 280 Pleasant Street, just down the road from the Concord
9 Hospital. On that day, Kenny McKenna was injured in an
10 accident on the job and he died shortly afterwards.

11 OSHA, the Occupational Safety and Health
12 Administration, responded to the scene. An OSHA officer
13 interviewed Mr. Craigue, the owner of the business.
14 Mr. Craigue stated to the officer that he had no employees,
15 only subcontractors, and that Kenny McKenna, the deceased, and
16 [REDACTED], a younger worker who was there on the day of the
17 accident, were subcontractors. That statement was a deliberate
18 falsehood and it was a falsehood with a purpose. Because if
19 McKenna was not an employee, Mr. Craigue would have no legal
20 responsibility for the accident that day.

21 The indictment in this case is relatively simple.
22 It has a single charge or count. That count alleges that on
23 August 28th, 2018, in a matter within the jurisdiction of the
24 U.S. Government -- namely, an OSHA investigation -- Mr. Craigue
25 knowingly and willfully made a materially false statement by

1 stating to an OSHA officer that Kenny McKenna and [REDACTED]
2 were subcontractors and not employees of Mr. Craigue or his
3 business when, in truth, as the defendant knew, McKenna and
4 [REDACTED] were employees and not subcontractors.

5 That's the whole charge before you in this case.
6 That's what you have to decide.

7 The government expects the evidence will show the
8 following: August 2018 was a hot and difficult month for Kenny
9 McKenna. He had been the lead worker for Craigue & Sons
10 installing siding and windows at 280 Pleasant Street for the
11 entire summer. It was a relatively big job for the company and
12 for the first part of the project, he had his usual coworker on
13 the scene, Mr. Chris Erickson. Erickson had worked alongside
14 McKenna for Craigue & Sons for a couple of years, but in late
15 July of 2018, Erickson abruptly stopped working and McKenna was
16 the only worker left.

17 Throughout that August, McKenna worked mostly alone,
18 climbing up and down the ladders to reach the sections where he
19 was installing new siding, measuring and cutting materials down
20 in the tent where the saws were set up, and climbing back up.

21 Back in June of 2018, two months earlier,
22 Mr. Craigue had been awarded the 280 Pleasant Street job and
23 signed a contract for it. Under the contract, Craigue & Sons
24 would be paid \$98,500 to remove the existing exterior and
25 install new windows and siding on the building.

1 One of the provisions in the contract required
2 Craigue & Sons to maintain insurance coverage, including
3 worker's comp insurance covering all employees of Craigue &
4 Sons.

5 In the third week in August, with the 280 Pleasant
6 Street job nearing completion and Kenny McKenna still working
7 alone, Mr. Craigue took steps to bring on another worker. The
8 defendant took out an ad on Craigslist, posting a full-time job
9 for, quote, general labor and listing himself as the contact
10 person. The ad described the job as installing windows and
11 vinyl siding, will train. Regarding payment, the ad stated:
12 Paid weekly; hourly rate will depend on experience.

13 ██████████ age ██████ years old, was looking for work
14 and he saw the Craigslist posting and called up the defendant.
15 The next day, August 24th of 2018, Mr. Craigue met in person
16 with ██████ in Concord. The defendant told ██████ that he needs
17 someone who would show up on time and be reliable. Mr. Craigue
18 said the pay would be \$15 per hour, paid weekly and in cash.
19 There was no discussion about ██████ being a subcontractor or
20 about ██████ having his own company, which ██████ did not.

21 Despite ██████ lack of experience with siding and
22 windows installation, Mr. Craigue hired ██████ on the spot and
23 told him to show up at 280 Pleasant Street Monday at eight
24 o'clock a.m.

25 So ██████████ started work that Monday. On the site

1 he met Mr. Craigue, along with Kenny McKenna, also known as
2 Skinny. The defendant walked [REDACTED] around the jobsite and
3 showed him the Craigue & Sons trailer and supplies, along with
4 a white tent where materials were kept and the equipment was
5 set up. Mr. Craigue directed [REDACTED] to assist Kenny McKenna.
6 Mr. Craigue stayed around the jobsite for a short time and then
7 he left.

8 That day, [REDACTED] worked as the ground man.
9 McKenna, who was mostly on the ladders, gave him measurements
10 and dimensions from where he was working and [REDACTED] would cut the
11 materials with a saw and hand up the cut pieces to McKenna.

12 The pair talked a good bit as they worked that day
13 and [REDACTED] discovered that McKenna had gone to school with [REDACTED]
14 dad and had mutual friends. McKenna talked to [REDACTED] about
15 Nathan Craigue and Craigue & Sons and about how Craigue
16 operated the business. Near the end of the workday,
17 Mr. Craigue showed up again at 280 Pleasant Street and he asked
18 Kenny McKenna how many hours he worked the previous week so he
19 could pay him.

20 The next day was Tuesday, August 28th. On that day,
21 [REDACTED] again reported to 280 Pleasant Street to work with
22 Kenny McKenna. That day was particularly hot. They worked as
23 they had on Monday with McKenna on the ladders and [REDACTED] on the
24 ground. At around ten o'clock a.m., Nate Craigue came by to
25 drop off materials, then left again after a few minutes. At

1 around eleven o'clock, McKenna took a break and then he got
2 back on the roof to continue installing trim.

3 [REDACTED] was in the tent momentarily checking his phone
4 when he heard Mr. McKenna fall. Kenny McKenna was on the
5 ground and obviously injured. [REDACTED] immediately called 911 and
6 within a short time there were nurses and doctors streaming out
7 of the medical building to help Mr. McKenna.

8 [REDACTED] next call on his cell phone was to Nate
9 Craigue. [REDACTED] told him that Skinny fell off the roof and that
10 he had called 911. Mr. Craigue responded: I'll be right
11 there; take down the ladders. [REDACTED] said okay and the call
12 ended.

13 [REDACTED] started to take down the ladders as Craigue had
14 instructed him, but people from the building told him not to
15 touch anything, so [REDACTED] left the ladders where they were.

16 [REDACTED] was asked to go to the hospital, where he
17 learned that Kenny McKenna had passed. He went back to the
18 jobsite and there a Scott Kelly, who is a veteran OSHA officer,
19 had responded to the scene wearing his OSHA hardhat and
20 credentials.

21 Now, OSHA is the federal Occupational Safety and
22 Health Administration that's charged with conducting worksite
23 inspections and investigations and enforcing workplace safety
24 regulations. Officer Kelly was gathering information from
25 Concord Police and others on the scene about the accident and

1 investigating potential workplace safety violations and he
2 wanted to interview [REDACTED] about what happened.

3 After [REDACTED] returned to the jobsite, but before
4 meeting with Officer Kelly, [REDACTED] again encountered Mr. Craigue
5 and the two privately discussed the shocking news that Kenny
6 McKenna had died. And then Mr. Craigue added something. He
7 told [REDACTED], don't forget, Skinny's a sub, you're a sub,
8 meaning a subcontractor.

9 You will hear testimony from Officer Kelly that one
10 of the first things an OSHA officer is required to do in a
11 workplace investigation is to determine who the employers and
12 the employees are on a jobsite. OSHA regulates at sites where
13 work is performed by an employee of an employer. It is
14 important to OSHA to determine which workers are employees to
15 assess whether they've been exposed to safety hazards. Only
16 employees, and not subcontractors, are subject to OSHA's
17 protections and only employers can be held responsible for
18 workplace safety violations or be required to fix them.

19 Officer Kelly met with both [REDACTED] and Nathan
20 Craigue. In a brief interview with Mr. Craigue's "remember
21 you're a sub" direction in his mind, [REDACTED] falsely told
22 Officer Kelly that he was actually a subcontractor for the
23 company. [REDACTED] told Kelly he was getting paid by the job, not
24 by the hour, and that he expected to receive a check from the
25 owner when the project was over. You will hear testimony that

1 [REDACTED] later went back to Officer Kelly and admitted that
2 he'd lied to him.

3 Officer Kelly also interviewed the defendant, Nathan
4 Craigue, sitting down at a picnic table with [REDACTED] nearby.
5 Mr. Craigue introduced himself and described his business and
6 Mr. Craigue told Officer Kelly that he didn't have any
7 employees and that he only used subcontractors. He said that
8 the two workers on the site, McKenna and [REDACTED], were actually
9 subcontractors and that he paid them at the end of the job by
10 the square foot.

11 Regarding Kenny McKenna, Mr. Craigue said that most
12 of the time he worked on jobs for other people and he would
13 come to work with Mr. Craigue for a few weeks when Craigue had
14 a big job. Mr. Craigue reiterated to Officer Kelly that
15 McKenna was just a subcontractor paid at the end of the job by
16 the square foot.

17 The defendant's statements that day to Officer Kelly
18 were materially false. It was not true that either [REDACTED]
19 or Kenny McKenna was a subcontractor. The other statements the
20 defendant made to convince Officer Kelly that [REDACTED] and McKenna
21 were subcontractors were also not true. It was not true that
22 McKenna worked with other companies and only worked
23 periodically with Craigue & Sons. It was not true that the
24 defendant paid his workers at the end of the job. It was not
25 true that Mr. Craigue paid them by the square foot as opposed

1 to by the hour. Mr. Craigue made those statements knowingly
2 and willfully. He did not simply misspeak in referring to his
3 workers as subcontractors.

4 Mr. Craigue told multiple people that day that Kenny
5 McKenna was a subcontractor. At the accident scene, the
6 defendant told a Concord police officer that Kenny McKenna was
7 a subcontractor who was helping him with this job. And when
8 Chris Erickson drove up, having heard about the accident, and
9 told Mr. Craigue that he could be in trouble, Mr. Craigue told
10 Erickson he was going to say Kenny McKenna was just a
11 subcontractor.

12 About two weeks after the accident, on
13 September 11th, Mr. Craigue met with an inspector for the
14 New Hampshire Department of Labor, Philip Martineau. On that
15 occasion, the defendant doubled down on his false statements.
16 He again said that he had independent contractors, not
17 employees, and later in a hearing before the New Hampshire
18 Department of Labor on October 15th Mr. Craigue again claimed
19 that McKenna was a subcontractor. In fact, both [REDACTED] and
20 McKenna were employees fully entitled to the legal protections
21 that employees receive.

22 The Court will instruct you about the various
23 factors that go into determining whether a particular worker is
24 a contractor as opposed to an employee. A good bit of the
25 evidence you'll hear in this trial will relate directly to

1 those factors.

2 Among other things, you will learn the following:
3 Kenny McKenna worked nearly exclusively for Craigue & Sons for
4 more than 20 years except for one period in 2008 when he went
5 to Texas and was employed by another company before returning
6 to New Hampshire and going right back to work for the
7 defendant; Kenny McKenna and [REDACTED] did the home
8 exterior and siding work that was part of Craigue & Son's
9 regular business and was not some separate specialty; Kenny
10 McKenna and [REDACTED] believed themselves to be employees of
11 Craigue & Sons and did not have a separate company or use a
12 separate company name or have their own liability insurance
13 while working for the defendant; Kenny McKenna and [REDACTED]
14 were paid by the hour, mostly in cash, and not by the job or by
15 the square foot; Mr. Craigue bid for and won the jobs for
16 Craigue & Sons and chose the worksites. Mr. Craigue directed
17 the work, set the hours, and hired the workers while Kenny
18 McKenna and [REDACTED] had no authority or ability to hire an
19 assistant.

20 Mr. Craigue had no contracts with Kenny McKenna or
21 [REDACTED]. Mr. Craigue provided the tools and the equipment,
22 except for hand tools, and parked his Craigue & Sons trailer at
23 each jobsite that they did.

24 Mr. Craigue had accounts at supply companies and he
25 purchased and supplied the materials for the business.

1 Mr. Craigue was aware that he was required to
2 provide worker's compensation insurance for his employees, but
3 after paying for worker's comp for years, he let it lapse in
4 2016 and there was no worker's comp covering the jobsite that
5 day. And Mr. Craigue was likewise aware that he was required
6 to have unemployment insurance for his employees, but after
7 buying unemployment insurance for a few years, he stopped
8 paying back in 2006 and never resumed.

9 That's a summary of the evidence. I know you will
10 listen carefully, and I ask you to use your experience and your
11 common sense as you evaluate it. It will prove beyond any
12 reasonable doubt that both McKenna and [REDACTED] were the
13 defendant's employees and not subcontractors and that on
14 August 28th, 2018, the defendant knowingly and willfully made a
15 false statement to an OSHA officer when he claimed that McKenna
16 and [REDACTED] were subcontractors and not employees and that the
17 false statement was material in this OSHA investigation.

18 At the close of the evidence, Mr. Gingrande and I
19 will ask you to return a verdict of guilty as charged.

20 Thank you.

21 MS. GRAHAM: May I just have one moment, your Honor?

22 THE COURT: Yes.

23 MS. GRAHAM: Good afternoon.

24 Nate is not guilty of this charge. This case is
25 about whether Kenny McKenna and [REDACTED] were actually

1 employees of Craigue & Sons and, second, whether Nate knowingly
2 and willfully lied to the federal agent. Nate did not lie to
3 Officer Kelly. He did not believe that [REDACTED] or Kenny were
4 his employees.

5 The two men that you will hear about in this case
6 is -- are Kenny McKenna, who Nate knew for many, many years.
7 And he did work with Craigue & Sons for years. And the other
8 individual you'll hear is [REDACTED], who did work for a day and
9 a half for Craigue & Sons.

10 Now, the history of Craigue & Sons is that this was
11 a small siding and roofing company owned and operated by Nate's
12 dad here in Concord for many, many years. And Kenny, after
13 high school, learned the trade through Nate's dad and he did
14 work for him, did work for him for -- for many, many years and
15 he became a very skilled and experienced carpenter.

16 But he just wasn't there and did jobs. He played
17 softball with Craigue & Sons, he knew the family, and they all
18 knew each other very well.

19 Now, at some point, it's roughly about 2001, 2002,
20 Nate took over his father's business. And he knew little about
21 how to run the business. Kenny took Nate under his wing and
22 showed him the ropes. He was an experienced carpenter. And he
23 did continue to work with Nate and Sons for many years, over
24 20 years, off and on, and it was not continuous.

25 As you heard, he moved to Texas for a period of

1 time. He worked in Texas, he had his own projects and his own
2 jobs. And after a couple of years of living in Texas, he came
3 back and there was work available to him, jobs and projects
4 available to him, through Craigue & Sons.

5 You can, as you hear this case, consider that
6 relationship, their personal relationship, that history, what
7 their understandings were between the two of them, what their
8 intentions were. You can consider all of that in understanding
9 why Nate would believe that Kenny was not his employee in
10 August of 2018.

11 So, as you heard, in the summer of 2018 Nate Craigue
12 got a contract through 280 Pleasant Street to do the work
13 there. And Kenny was there on August 28th doing his job,
14 putting up siding, and [REDACTED] had answered an ad and he had
15 arrived on the site on August 27th.

16 And when [REDACTED] met with Nate, they talked about
17 and discussed the project, that he would file a 1099, which is
18 a form that subcontractors file, and Nate told him where the
19 project was. And so [REDACTED] showed up on August 27th and
20 then he came back the next day.

21 The next day, his second day on the job, Kenny felt
22 dizzy and he felt sick and he fell. And [REDACTED] immediately
23 called the police, an ambulance, and called Nate. And Nate
24 came right over.

25 And when Nate showed up, Kenny was laying on the

1 ground. There were police there, there was an ambulance there,
2 and [REDACTED] went into the ambulance and went to the hospital
3 with [REDACTED] and Nate stayed at the jobsite.

4 And at some point Officer Kelly arrived and began
5 asking questions and a little while later, [REDACTED] came back
6 from the hospital. And as Officer Kelly was questioning Nate,
7 Nate learned that Kenny had died. And this is a person that he
8 had known all of his life, who had known his dad, that he
9 basically grew up around.

10 Nate was very upset. He was stunned, he was
11 shocked, and he didn't want -- and couldn't answer any
12 questions. And it's during that exchange between Agent Kelly
13 and Nate that the government contends that Nate lied by saying
14 that Kenny and [REDACTED] were contractors and were not
15 employees.

16 So the government here first has to prove that
17 Kenny and [REDACTED] were actually employees and were not
18 subcontractors and that Nate knew and that he understood that
19 what he said was a lie.

20 So how do you figure out if Kenny and [REDACTED] were
21 actually employees? Because employee is a legal term, and the
22 Court will give you a jury instruction at the end of this case
23 to help you to understand it, to explain it, and it's a long
24 list of factors to consider. It's a complicated legal test
25 with many issues to consider, many things to weigh, and many

1 things to think about.

2 At that scene, Nate wasn't given a list of terms or
3 factors to consider. He wasn't given a list that spelled out
4 this is what you do to balance all these factors to come up
5 with this conclusion. Nate wasn't given time to consider all
6 of that. He was stunned. He was shocked about Kenny.

7 What Nate believed and understood is crucial in this
8 case. How could Nate possibly know that under a complicated
9 legal test that Kenny and [REDACTED] might be employees rather
10 than subcontractors? Nate told Officer Kelly what he believed
11 and what he understood to be the truth. And that is not a
12 crime.

13 THE COURT: All right. Thank you, Counsel.

14 Is the government ready to call its first witness?

15 MR. DAVIS: Yes, your Honor.

16 THE COURT: All right.

17 MR. GINGRANDE: Your Honor, the government calls
18 Robert Wilkins to the stand.

19 THE CLERK: I just need one moment to move the
20 lectern.

21 THE COURT: All right. We just need a moment to
22 move the lectern out of the way.

23 Hello, sir.

24 THE WITNESS: Hello.

25 THE COURT: You'll be sworn in in a moment.

1 THE WITNESS: Yes, ma'am.

2 THE COURT: Attorney Esposito, can you swear in the
3 witness?

4 THE CLERK: Yes.

5 Thank you, sir. Please raise your right hand.

6 **ROBERT WILKINS**, having been first duly sworn,
7 testified as follows:

8 THE CLERK: Thank you. State your full name, spell
9 your last name for the record.

10 THE WITNESS: Robert Brian Wilkins, W-i-l-k-i-n-s.

11 THE CLERK: Thank you very much. Please be seated.

12 DIRECT EXAMINATION

13 BY MR. GINGRANDE:

14 Q. Good afternoon, Mr. Wilkins.

15 A. Good afternoon.

16 Q. Do you live in New Hampshire?

17 A. Yes, sir.

18 Q. And how long have you lived in New Hampshire?

19 A. Approximately 27 years, 28 years.

20 Q. And are you married?

21 A. Yes.

22 Q. How far did you go in school?

23 A. Started college and then stopped and joined the
24 Navy.

25 Q. Okay. You said you stopped college and joined the

1 Navy?

2 A. After my first year.

3 Q. Are you currently working?

4 A. No.

5 Q. And why not?

6 A. I had a stroke in January. I'm still in recovery.

7 Q. And that was January of this year?

8 A. Yes.

9 Q. Are you doing better now?

10 A. Mostly. Some minor issues still going on. I
11 have -- I'm in what's called AFib and my heart doesn't beat
12 regularly and we're going for a surgical resolution in a month
13 or two.

14 Q. And has your stroke had any effect on your
15 cognition?

16 A. Some minor ones. I have trouble speaking
17 occasionally, typing, things like that, reading a little bit.
18 Short-term memory is kind of a little loose.

19 Q. Has your stroke negatively affected your long-term
20 memory?

21 A. No, not at all.

22 Q. Has your stroke had any affect on your ability to
23 remember the particular event we will be talking about today on
24 August 28th, 2018, and the summer of 2018?

25 A. None at all.

1 Q. So prior to your stroke, what did you do for work?

2 A. I'm a medical assistant.

3 Q. Okay. And where did you work directly prior to your
4 stroke?

5 A. I was working for Granite State -- Granite State
6 Gastroenterology. Sorry.

7 Q. Not a problem. And your role there, you said, was a
8 medical assistant?

9 A. Yes, sir.

10 Q. Okay. And were you a medical assistant prior to
11 that as well?

12 A. Yes.

13 Q. And for how long were you a medical assistant prior
14 to that? You can approximate.

15 A. '84, since 1984. So 16, 21 -- 36, 37 years.

16 Q. Okay. And how did you first gain medical
17 experience?

18 A. I was a corpsman in the Navy. I trained in
19 San Diego, transferred to Philly, was there for a couple years
20 in the naval hospital and then transferred to a ship in the
21 Charleston, South Carolina, shipyards and spent a couple years
22 on a ship.

23 Q. Got it. And when you were in the Navy, did you have
24 the opportunity to become an EMT?

25 A. Yes. I -- when I transferred to Philly, I was

1 designated by the captain of the base to take EMT training and
2 whatever other things they wanted, needed.

3 Q. Got it. So now I want to turn your attention to the
4 summer of 2018.

5 A. Uh-huh.

6 Q. Were you working at Pleasant Street Family Medicine
7 at that time?

8 A. Yes, I was.

9 Q. And was your office located at 280 Pleasant Street
10 in Concord?

11 A. Yes.

12 Q. Okay. And what was your position there?

13 A. I was a medical assistant, lab tech.

14 Q. Okay. Makes sense. You said you've been doing it
15 for 40 years.

16 During the year 2018, did you see construction
17 occurring on the building at 280 Pleasant Street in Concord?

18 A. Yes, sir.

19 MR. GINGRANDE: I'd now like to show the witness
20 what's been marked for identification as Government Exhibits
21 201 and 202, if you would, Ms. Sheff.

22 THE CLERK: None of the jury monitors are on.

23 MR. GINGRANDE: I'm sorry?

24 MS. GRAHAM: These are for ID only.

25 MR. GINGRANDE: Yeah. Is the witness able to see it

1 on his screen?

2 THE WITNESS: No.

3 THE COURT: I can't see it on mine, so I'm guessing
4 no.

5 MS. SHEFF: Do you want me to show --

6 MR. GINGRANDE: Yes, please, Ms. Sheff, 201 and 202.

7 MS. GRAHAM: Your Honor, we're going to object to
8 this.

9 THE COURT: Showing it to the jury.

10 MS. GRAHAM: Yes.

11 THE COURT: Is that what you're objecting to?

12 MS. GRAHAM: Yes.

13 MR. GINGRANDE: I'm not asking for it to be shown to
14 the jury, just the witness at this time.

15 THE COURT: Okay. How do we get this turned on so
16 that I can see it and the witness can see it? And I thought I
17 also had a hard copy of the exhibits. No?

18 THE CLERK: Yes. I can get those.

19 THE COURT: Okay.

20 THE CLERK: Yes. Let me work on -- I'm going to
21 come up behind you, Judge.

22 THE COURT: No problem.

23 THE CLERK: Can counsel see the exhibits?

24 MR. GINGRANDE: No.

25 MR. DAVIS: No. Can you put it up for ID?

1 MS. SHEFF: Do you want me to turn it on, put it up
2 now? I'm afraid to put it up if it's going to be --

3 THE COURT: Right. I would just wait until we --

4 MS. SHEFF: Okay.

5 THE COURT: Usually you control this, I thought,
6 Donna.

7 THE CLERK: Well, her station's on and I don't have
8 any of the jury monitors on.

9 THE COURT: Okay.

10 THE CLERK: The jury monitors are off.

11 MS. SHEFF: So you want me to call it up?

12 THE CLERK: Yes.

13 THE COURT: I can't see it.

14 MS. SHEFF: Is that good?

15 MR. GINGRANDE: I can see it now.

16 THE CLERK: Counsel can see it.

17 Mr. Wilkins, can you?

18 THE WITNESS: Yes, I can see it.

19 THE CLERK: Okay.

20 THE COURT: If I had a hard copy of the exhibits,
21 I'd be okay with that.

22 MR. DAVIS: What exhibit, number 201?

23 MR. GINGRANDE: 201.

24 MS. SHEFF: We have an extra copy.

25 THE COURT: I can be old school and look at things

1 on paper. Okay.

2 MR. GINGRANDE: Your Honor, may I proceed?

3 THE COURT: Is there an objection?

4 MS. GRAHAM: Yes, your Honor.

5 THE COURT: Do you want to deal with that now or --

6 MR. GINGRANDE: We could have a sidebar.

7 THE COURT: Okay.

8 AT SIDEBAR

9 THE COURT: All right. We're talking about
10 Exhibit 201, a photograph of the building.

11 THE CLERK: Judge, I'm sorry.

12 THE COURT: I'm assuming I'm talking to counsel.

13 Can you hear me?

14 MR. GINGRANDE: I can hear you.

15 THE COURT: Okay.

16 THE CLERK: Hold on.

17 THE COURT: No one else?

18 MR. MIRHASHEM: I can hear you.

19 MS. GRAHAM: I cannot.

20 THE COURT: Can you hear me, Attorney Graham?

21 MS. GRAHAM: I cannot. Mine is not acting -- I
22 cannot -- my -- it's not working. Can you hear --

23 THE COURT: Can you hear me now? Can you hear me
24 now?

25 MS. GRAHAM: And no one can hear me, correct?

1 THE COURT: I can hear you.

2 MR. GINGRANDE: I can hear you.

3 MS. GRAHAM: Can any -- okay. This doesn't work.

4 THE COURT: All right. Can you hear me, Attorney
5 Graham?

6 MS. GRAHAM: I can now, yes.

7 THE COURT: Okay. Good. All right.

8 And I'm looking at a photo, Government Exhibit 201
9 for ID, and I think Attorney Gingrande was going to ask
10 Mr. Wilkins some questions about it.

11 MR. GINGRANDE: Yes. And 202 as well, your Honor.

12 THE COURT: 202 as well.

13 MR. GINGRANDE: It's just the same version as 201
14 with a slightly different angle.

15 THE COURT: Okay. Go ahead, Attorney Graham.

16 MS. GRAHAM: Thank you, your Honor.

17 I object on the basis of 403. The photos contain
18 basically police tape, but it also includes ladders on the roof
19 and it shows an unsafe work -- workplace with the ladders.
20 There were multiple pictures in discovery that did not include
21 any of the ladders or the tape if the -- if the reason was to
22 just show the place of employment or where the worksite was.
23 So I think that the -- that it's more prejudicial than
24 probative and I would object to the jury seeing this.

25 THE COURT: Attorney Gingrande.

1 MR. GINGRANDE: The government would simply respond
2 that this was the scene on the day of the accident as -- being
3 depicted as it was that day. We are not introducing it to get
4 into any safety issues.

5 I -- I don't see that safety issues can be inferred
6 from this and will not be talking about workplace safety, but
7 it is necessary to describe the events of the day and to
8 provide context so that the jury can see what is going on and
9 to show, specifically with regards to this witness, his ability
10 to observe the events in question and also to describe the work
11 that was going on on -- on the building.

12 THE COURT: Okay. I -- can you hear me?

13 I look at 202 and 2-0 -- 201 and 202 and see the
14 ladders and I -- it looks unsafe to me. That's the first
15 reaction I have to the photos is that they are showing pictures
16 of a workplace that have ladders that I certainly wouldn't want
17 to be climbing up on and working on.

18 So I don't think it is crucial in any respect for
19 the jury to see these photos. I do think these photos, because
20 of the ladders and the way that they're placed on the house,
21 suggest that it is unsafe and ultimately the probative value
22 seems minimal to me. He can describe the scene. They don't
23 need to see the house. It doesn't really tell them much.

24 And so I think that the 403 objection is well taken
25 and I find that the probative value is substantially outweighed

1 by the danger of unfair prejudice. So these two photos are
2 excluded.

3 Go ahead, Attorney Gingrande.

4 CONCLUSION OF SIDEBAR

5 THE COURT: Go ahead, Attorney Gingrande.

6 MR. GINGRANDE: Thank you, your Honor.

7 Q. I'd like to talk to you about your observations
8 of the -- the construction project that was happening at
9 280 Pleasant Street.

10 So I believe you -- you had said that you saw
11 construction occurring on the building at 280 Pleasant Street
12 over the course of the summer?

13 A. Yes.

14 Q. And can you describe how -- what you saw and what
15 work was being done?

16 A. Various projects, siding, roofing fixes, some
17 painting, window replacements, anything to do with the building
18 that needed to be fixed or adjusted. There was a lot of repair
19 going on.

20 Q. Okay. And specifically did you observe repair being
21 done on the siding of the building?

22 A. Yes.

23 Q. Okay. Did you observe equipment being used to do
24 that siding?

25 A. Yes, there was --

1 MS. GRAHAM: Objection, your Honor, as to relevance.

2 THE COURT: Overruled.

3 Q. You can answer the question.

4 A. Every day there would be more equipment, different
5 equipment, everything -- everything you could possibly imagine,
6 cutting, fitting pieces in, the usual construction you would
7 see on any site.

8 Q. Okay. And did you observe a worker on the jobsite
9 named Ken McKenna?

10 A. Yes.

11 Q. Did -- did you know him to have a nickname?

12 A. He was known as Skinny.

13 Q. And was that because he was thin?

14 A. Very. Very noticeable. He was wiry thin.

15 Q. How often did you see Mr. McKenna --

16 A. Almost --

17 Q. -- on the worksite?

18 A. As far as I can remember, almost every day.

19 Q. Okay. And is that true of the entire time you
20 remember the construction being done on the building that
21 summer?

22 A. With the exception of rainy days, yes.

23 Q. Okay. Did you ever see other workers on the jobsite
24 working with Mr. McKenna?

25 A. Yes.

1 Q. Okay. Were there ever days when Mr. McKenna was the
2 only one working there?

3 A. I believe so, yes.

4 Q. And the other workers that you saw, were there --
5 there are a couple of other workers who would work with him on
6 occasion?

7 A. Yeah, varying workers; different days, different
8 workers, but regular faces.

9 Q. Okay. And in terms of Mr. McKenna, what did you
10 observe, if anything, about Mr. McKenna's work ethic?

11 A. He was always at work. He -- he was -- I never saw
12 him not doing anything. He -- I never saw him stop. He worked
13 all day.

14 Q. Did you ever see him going up and down ladders?

15 A. Yes, every day.

16 Q. And did you see him working on hot days?

17 A. Exceptionally hot days, I couldn't believe he would
18 be working in them.

19 Q. Okay. And was he working on the exterior of the
20 building --

21 A. Yes.

22 Q. -- did you observe that?

23 Did you see, was -- and I think you said that you
24 saw him doing siding work.

25 A. Yes, sir.

1 Q. And he was doing that on the exterior of the
2 building. Can you describe how you were able to make these
3 observations?

4 A. There's two windows on my work space. One is
5 directly in front of me and one was directly to my left in
6 clear view of most of the work they're doing every day.

7 Q. Okay. And so you could see him through -- through
8 those windows?

9 A. Yes.

10 Q. And they were clear windows?

11 A. Yes.

12 Q. Okay. Now I want to direct your attention to
13 August 28th, 2018. Were you working at 280 Pleasant Street
14 that day?

15 A. Yes.

16 Q. And did something memorable happen that day?

17 A. There was an accident and Skinny fell off the roof
18 and landed in the courtyard for -- per se, of our work
19 building.

20 Q. Okay. And how you were -- how were you aware that
21 this had happened?

22 A. We had heard some -- I personally had heard
23 something happen and I heard a commotion. I opened the -- at
24 that time, I had had the shade down. I looked out and there
25 was Skinny on the ground, and I yelled someone to call 911.

1 I rushed to the side door, which is behind me, and I
2 came out and we -- a few of us were meeting together from my
3 door and another door in the clinic.

4 Q. So when you rushed out, did you observe Mr. McKenna?

5 A. Yes, sir. I had rushed up to him, but the -- one of
6 the physicians had reached him just before me and as a
7 physician, he's in charge. So I said, what do you need me to
8 do, and we let him take -- start looking at Skinny.

9 Q. Okay. And did it appear to you that Mr. McKenna had
10 fallen?

11 A. Very much so.

12 Q. Okay. And fallen from the roof?

13 A. Yes.

14 Q. So at that time when you rushed out, were there
15 other doctors or anyone else from the building who also came
16 out with you?

17 A. A nurse, other medical assistants, the physician,
18 nurse practitioner. They were all there to render help when
19 necessary.

20 Q. Did you also see anyone else who was working on the
21 jobsite?

22 A. A young man who was -- I believe had just started
23 that day.

24 Q. Okay. And had you met the young man before?

25 A. Not personally, no. I saw him there, but hadn't met

1 him.

2 Q. And that young man, that was [REDACTED]?

3 A. I think so. Yes, I believe so.

4 Q. Can you describe [REDACTED] demeanor when you saw
5 him?

6 A. He was obviously distressed at having witnessed what
7 happened.

8 Q. Okay. And did you -- when you say he was obviously
9 distressed, I mean, you could see it in his face?

10 A. You could see it in his face, his actions. He -- he
11 was very distressed, very upset.

12 Q. Okay. Did you observe him to be on the phone?

13 A. At one point, yes, I did.

14 MR. GINGRANDE: Okay. Your Honor, with the Court's
15 indulgence, I'd like to ask for a sidebar.

16 THE COURT: Sure.

17 AT SIDEBAR

18 MR. GINGRANDE: Can you hear me?

19 THE COURT: I can. Can you hear me?

20 MR. GINGRANDE: I can.

21 THE COURT: Okay. Go ahead.

22 Can you -- can you hear him, Attorney Graham?

23 MS. GRAHAM: I can.

24 THE COURT: Okay.

25 MR. GINGRANDE: Your Honor, at this point I would

1 seek to introduce the statement of [REDACTED] that [REDACTED] made to
2 the witness after that phone call. And we believe this meets
3 the hearsay exception as an excited utterance based upon [REDACTED]
4 statement at the time, but I wanted to confer with counsel
5 first to see if that had their agreement and, if not, to
6 proceed by asking the Court to make a ruling.

7 THE COURT: All right. Do you know what the
8 statement is going to be, Attorney Graham?

9 MS. GRAHAM: I do, and I do object.

10 THE COURT: Okay. Tell me what the statement is
11 going to be.

12 MR. GINGRANDE: The statement is going to be that he
13 had spoken with his boss and that his boss wanted him to -- the
14 statement will either come in as clean things up, which is
15 terminology that Wilkins has used before, or more specifically
16 could be -- I think that's it, clean things up. I think that's
17 what he said.

18 THE COURT: Okay. And you're trying to get it in as
19 an excited utterance, a statement relating to a startling event
20 or condition made while the declarant was under the stress of
21 excitement that it caused.

22 MR. GINGRANDE: Yes.

23 THE COURT: Okay. And the startling event or
24 condition is witnessing the death of McKenna.

25 MR. GINGRANDE: Yes.

1 THE COURT: And this statement, after he gets off
2 the phone with Mr. Craigue, allegedly, is relating to that
3 event or condition.

4 MR. GINGRANDE: That's right.

5 THE COURT: Okay. What's your argument, Attorney
6 Graham, that it doesn't fall under excited utterance?

7 MS. GRAHAM: It is not a statement that was made
8 about the startling event. So, for example, it wasn't a
9 statement that was really about what he saw or what was told or
10 what he viewed. This was a telephone conversation after the
11 event and was not about that startling event. It seems to be
12 that it's a different conversation that has nothing to do with
13 what he had just seen.

14 THE COURT: Okay. I'm going to overrule your
15 objection and allow this. This comes in.

16 He's just witnessed the death of his coworker and
17 he's gotten on the phone almost immediately with his boss,
18 allegedly, and the startling event is the death of his friend.
19 And then it's also startling to him that his boss makes the
20 statement he does.

21 So ultimately, this is an excited utterance and it
22 comes in and so I overrule the objection.

23 Go ahead, Attorney Gingrande.

24 MR. GINGRANDE: Thank you.

25 CONCLUSION OF SIDEBAR

1 Q. So, Mr. Wilkins, I believe I asked just you and you
2 had testified that you observed [REDACTED] on the phone.

3 A. Yes.

4 Q. And did you observe him hang up that phone?

5 A. Yes.

6 Q. Okay. And after his phone call ended, what did
7 [REDACTED] start to do, if anything?

8 A. He started to pick up pieces of equipment,
9 straightening out things. And I -- it -- it looked like he was
10 trying to clean up the site a little bit and I told him he had
11 to stop.

12 Q. So did you ask him what he was doing?

13 A. Yes, and he said my boss told me to clean up the
14 area.

15 Q. Okay. And so what did you say in response to
16 [REDACTED]

17 A. I told him he could --

18 MS. GRAHAM: Objection as to hearsay, your Honor,
19 relevance.

20 THE COURT: Sustained.

21 Q. So you -- you -- I believe you testified -- you had
22 testified that he had -- he had started to pick things up --

23 A. Uh-huh.

24 Q. -- and at that point, you said something to him.

25 A. Yes.

1 Q. Okay. And as a result of your saying something to
2 him, did [REDACTED] do anything?

3 A. He stopped picking up the area. And I told him we
4 needed to --

5 MS. GRAHAM: Objection, your Honor, hearsay.

6 MR. GINGRANDE: These are statements -- I'm sorry,
7 your Honor.

8 THE COURT: Sustained.

9 Q. Did you -- so just responding to that question about
10 what he did after you spoke to him, he stopped cleaning up the
11 site; is that right?

12 A. Yes.

13 Q. Okay. And, specifically, did he stop putting
14 equipment away?

15 A. Yes.

16 Q. Okay. And what happened next?

17 A. We made a clear path for the -- the ambulance gurney
18 to come through so they could reach the -- Skinny easier,
19 without having to go the long way around and come straight up
20 the grass.

21 Q. And when you say we, who are you referring to?

22 A. Myself, another assistant was watching us, and
23 Mr. -- the young man. I can --

24 Q. [REDACTED]?

25 A. [REDACTED], yes. We just made sure that the ambulance

1 could get up as close as possible and they'd be able to take
2 the gurney right over to the scene.

3 Q. And did the ambulance arrive on the scene after
4 that?

5 A. Yes.

6 Q. Did anyone else arrive on the scene that you recall?

7 A. Police, OSHA, various other people got there. Some
8 I did know, some I -- most of them I didn't know.

9 Q. Did you interact with any of them?

10 A. One or two of them; the police officer, the
11 ambulance drivers.

12 Q. Okay. And did you tell the police officer what you
13 had done to clear the path?

14 A. Yeah, I had made sure because it was -- there was
15 going to be an investigation; there'd been an accident and I
16 knew that there would have. And I told him what we moved, what
17 we did, and why we'd done it. And that was all --

18 Q. Okay.

19 A. -- to the officers.

20 MR. GINGRANDE: Court's indulgence?

21 THE COURT: Yes.

22 MR. GINGRANDE: No further questions here.

23 THE COURT: Attorney Graham, Attorney Mirhashem?

24 MS. GRAHAM: I have no questions. Thank you.

25 THE COURT: Okay. The witness may be excused.

1 Thank you, sir.

2 THE WITNESS: Thank you.

3 THE COURT: All right.

4 (Witness excused.)

5 THE COURT: It's just after four o'clock, so we are
6 going to call it a day today. And -- but before we do that, I
7 am going to read a stipulation for you. A stipulation means
8 simply that the government and the defendant accept the truth
9 of something since there's no disagreement, there's no evidence
10 apart from the stipulation.

11 Now I'm going to read you the stipulation.

12 The parties stipulate that there is no evidence and
13 no allegation that Mr. Craigue, the defendant, was responsible
14 in any way for the death of Kenneth McKenna.

15 Now, the parties have stipulated as to that fact. I
16 instruct you that you must not speculate about the cause of
17 Mr. McKenna's death.

18 So tomorrow you'll come at 9:00 a.m. We'll start
19 our trial right at 9:00 a.m., so probably come a little before
20 9:00. I'll meet with the lawyers before 9:00 and hopefully get
21 started right on time.

22 And just keep my instructions in mind about not
23 talking about the case. And, again, if people ask you, which
24 they no doubt will, just blame it on the judge; the judge has
25 ordered me not to speak to you; I'm sorry, but I have to

1 fulfill my duty and obligation to the court as a juror. All
2 right? So blame it on me, but you can't talk about it, you
3 can't research it. And I'll see you tomorrow morning at 9:00
4 a.m. sharp.

5 Thank you very much.

6 THE CLERK: All rise for the jury.

7 (Jury excused.)

8 THE COURT: Okay. Well, that was a long day,
9 picking that jury and getting to this point, but the trial has
10 started and bravo to counsel.

11 Let me see if I can check in with you. You're
12 probably ready to get out and go home and relax. So am I. But
13 let me just check in with you about any issues you think I may
14 be able to help you resolve before tomorrow. And if there are
15 any, we can meet at 8:00 a.m. if you want and go over those
16 issues starting fresh at 8:00. I just want to make sure that
17 we start the trial on time as soon as the jury gets here.

18 Are there any issues that I need to help you with
19 today? And do you --

20 MR. DAVIS: Not --

21 THE COURT: -- do you want to do this confidentially
22 at sidebar, Attorney Mirhashem, or are you --

23 MR. MIRHASHEM: No, this is fine.

24 THE COURT: Okay. We're just in the habit now of
25 wearing these.

1 MR. MIRHASHEM: He can go ahead.

2 MR. DAVIS: We don't have any issues, Judge.

3 THE COURT: Okay. All right.

4 MR. DAVIS: We can start smoothly tomorrow. We do
5 have to figure out a witness order and we'll notify counsel
6 what it is.

7 THE COURT: Okay.

8 MR. MIRHASHEM: I was going to agree with that. I
9 think there are a number of evidentiary issues that, frankly,
10 are going to have to be decided in the context of the testimony
11 and how it comes in and I think it's going to be difficult.
12 It's going to be like these photographs. I think you'll
13 probably want to hear the testimony and the context to make
14 your rulings. So that --

15 THE COURT: Right.

16 MR. MIRHASHEM: -- would be my suggestion.

17 THE COURT: I actually like the hard copies here and
18 so I'll just focus here. Plus I have my mic here and I need
19 this to work. So I think I'll focus on the hard copies --

20 THE CLERK: I'll make sure you have a set.

21 THE COURT: -- and not worry too much --

22 THE CLERK: Okay.

23 THE COURT: -- about the screen because I actually
24 have to whisper straight into the microphone for you for this
25 to work.

1 Go ahead, Attorney Davis.

2 MR. DAVIS: Judge, the only other thing I'd say is
3 as with the excited utterance issue, we will do our best to
4 anticipate a potential issue and then tee it up and then
5 perhaps -- and it's actually easier and quicker now with the --
6 with these, we can -- so I -- we'll try to keep doing that. We
7 may miss one or, you know, some, but --

8 THE COURT: That was excellent, Attorney Gingrande,
9 to handle it that way before the statement came out. So that
10 was good and I'm happy to try to help you handle those in
11 advance.

12 MR. GINGRANDE: Happy to do it.

13 THE COURT: Any -- Attorney Graham?

14 MS. GRAHAM: May I just have one moment?

15 THE COURT: You may have as many moments as you
16 need.

17 It does seem a little warm here at the end of the
18 day, so maybe we tell our GSA folks to maybe increase the air
19 as the day goes on, because right now it's a little bit warm.

20 I'm keeping an eye on the CO₂ levels. Don't you
21 worry.

22 MR. DAVIS: Sorry, Judge.

23 THE COURT: I think they needed a moment, so I'm
24 just waiting.

25 MR. DAVIS: Yeah.

1 MS. GRAHAM: We're good.

2 MR. MIRHASHEM: Nothing further, your Honor.

3 THE COURT: You are good. All right.

4 So I will see counsel at 8:00 a.m. sharp. If
5 there's nothing you need me for, then just let Attorney
6 Esposito know and I'll see you for trial at 9:00. But if
7 something comes up, please, let's use that time as needed.

8 I know there's one witness, if you call him, we need
9 to do a voir dire outside the presence of the jury, so I'd love
10 the timing of that to coincide with a lunch break or with, you
11 know, the morning hour or perhaps the end of the day, right
12 now, so that the jury isn't waiting for that to happen.

13 But, otherwise, I will see you at 8:00 unless you
14 notify Attorney Esposito that you do not -- neither one of you
15 needs to meet with me.

16 I'm presuming certain things can come up in the
17 evening that may need my attention at 8:00, so I'm going to
18 keep that eight o'clock appointment on for tomorrow and let you
19 notify Attorney Esposito to cancel that in advance. Okay?

20 MR. MIRHASHEM: When should we let -- I just don't
21 want to inconvenience the Court --

22 THE COURT: I will be here anyway, so you do not
23 need to worry about that. If you let her know --

24 THE CLERK: Just email me at any point or I can give
25 you my cell if that's easier.

1 MR. DAVIS: We'll try to know by 7:30, if that
2 works, 7:30 a.m. --

3 THE CLERK: Perfect.

4 MR. DAVIS: -- and let you know, Ms. Esposito.

5 THE CLERK: Perfect.

6 THE COURT: Excellent. Well, thank you, everybody.
7 Court's adjourned.

8 (Proceedings adjourned at 4:14 p.m.)
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C E R T I F I C A T E

I, Liza W. Dubois, do hereby certify that
the foregoing transcript is a true and accurate transcription
of the within proceedings, to the best of my knowledge, skill,
ability and belief.

Submitted: 7/22/21

/s/ Liza W. Dubois
LIZA W. DUBOIS, RMR, CRR